

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PROTECT OUR HOMES AND HILLS,  
et al.,

Plaintiffs and Respondents,

v.

COUNTY OF ORANGE,

Defendants and Respondents;

YORBA LINDA ESTATES, LLC,

Real Party in Interest and Appellant.

G056618

(Super. Ct. No. 30-2015-00797300)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

Songstad Randall Coffee & Humphrey LLP, and William D. Coffee for  
Real Party in Interest and Appellant.

Kevin K. Johnson, Kevin K. Johnson and Jeanne L. MacKinnon for  
Plaintiffs and Respondents.

No appearance for Defendants and Respondents.

In this ongoing litigation pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; CEQA), real party in interest Yorba Linda Estates, LLC (Yorba Linda Estates), appeals from an order granting Protect Our Homes and Hills and others (collectively, Protect) about \$93,000 in attorney fees under Code of Civil Procedure section 1021.5.<sup>1</sup> The fees relate to work performed by Protect in a prior appeal which resulted in the issuance of a second writ of mandate against the County of Orange (County) based on the County's failure to comply with CEQA in preparing an environmental impact report for a residential project proposed by Yorba Linda Estates.

Yorba Linda Estates contends the trial court erred by awarding attorney fees because Protect failed to make all the necessary showings under section 1021.5, and this court did not award Protect costs on appeal. It also urges us to depart from well-established precedent concerning the calculation of attorney fees. We find no justification for doing the latter, and, following precedent, we find no error. Accordingly, we affirm the attorney fees order in full.

### **FACTS AND PROCEDURAL HISTORY<sup>2</sup>**

After County certified a final environmental impact report (FEIR) for a 340-single family home Project proposed by developer and real party in interest Yorba Linda Estates, Protect filed a writ of mandate challenging the certification of the FEIR and the related land use approvals. The trial court rejected most of Protect's contentions, but found merit in those concerning the FEIR's greenhouse gas analysis and mitigation. It issued a preemptory writ of mandate (first writ) specifying steps for the County to take regarding the FEIR and the Project approvals.

---

<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise specified.

<sup>2</sup> A more detailed version of the facts and procedural history may be found in our opinion addressing the underlying merits of Protect's writ petition. (*Protect Our Homes & Hills v. County of Orange* (Oct. 13, 2017, G054185) [nonpub. opn.] (*Protect I*).)

On appeal, this court affirmed the judgment, in part, and reversed, in part. (*Protect I, supra*, G054185.) We identified the following additional deficiencies in the FEIR: lack of the requisite accurate and stable description of the Project’s environmental setting; failure to properly analyze water supply availability; and inadequate mitigation of fire hazard impacts. We remanded the matter to the trial court with directions it modify the judgment and issue another preemptory writ of mandate (second writ) ordering County to take steps to correct the additional deficiencies. (*Ibid.*) In our disposition of the appeal, we ordered “each party [to] bear their own costs in the interests of justice.”

Since the time of our first opinion, we have issued two additional opinions—one in an appeal by Yorba Linda Estates, and the other in an appeal by Protect. Our second opinion affirmed an award of attorney fees and costs to Protect based on the trial court’s original judgment and grant of a limited writ. (*Protect Our Homes & Hills v. County of Orange* (Oct. 25, 2018, G054631) [nonpub. opn.].) Our third opinion affirmed, in part, and reversed, in part, the trial court’s order discharging the first writ based on County’s alleged compliance with the writ’s directives. (*Protect Our Homes & Hills v. County of Orange* (May 8, 2019, G0545716) [nonpub. opn.].)

Meanwhile, pursuant to section 1094.5, Protect filed a motion for \$116,217.50 attorney fees related to the first appeal. County and Yorba Linda Estates opposed the motion. The trial court granted the motion, but reduced amount to \$92,974.

Yorba Linda Estates appealed.

## **DISCUSSION**

Yorba Linda Estates primarily challenges Protect’s entitlement to attorney fees. It contends awarding any fees was error because (1) we ordered the parties to bear their own costs in the first appeal; (2) the first appeal did not confer a significant public benefit; and (3) Protect failed to demonstrate its fiscal resources are minimal. It also argues the trial court should not have awarded attorney fees related to issues on which they did not prevail on appeal. We find no error and affirm.

“Section 1021.5 codifies the private attorney general doctrine the Supreme Court adopted in *Serrano v. Priest* (1977) 20 Cal.3d 25. [Citation.] ““The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]’ [Citation.]”” (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 611 (*CBD*)). It may be used to recover attorney fees in a CEQA action. (*Id.* at p. 612.)

To recover fees under section 1021.5, a prevailing CEQA petitioner must show the litigation (1) vindicated an important public right, and (2) imparted a significant benefit on the general public or a large class of persons. In addition, it must demonstrate the need for private enforcement and that the financial burden on it was out of proportion to its individual stake in the matter. (*CBD, supra*, 188 Cal.App.4th at p. 611.) Once the trial court determines a petitioner is entitled to attorney fees, it exercises its discretion to calculate the proper amount. The court begins with what is commonly referred to as the lodestar—number of reasonable hours multiplied by the reasonable hourly rate for each attorney—and then makes any increases or decreases it deems appropriate based on various factors. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985.)

Yorba Linda Estates first argues Protect was not entitled to attorney fees as a result of this court’s order that the parties were to bear their own costs on appeal. It reasons if it was not in the interest of justice to grant Protect costs, then it similarly should not be in the interest of justice to award Protect fees.

But Yorba Linda Estates waived the argument, because it did not raise the argument in the trial court<sup>3</sup> (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381), and it provides no legal authority to support the argument in its appellate briefing (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865).

Even if we were to consider the waived argument, it fails. The award of costs on appeal and entitlement to attorney fees are two entirely separate matters, governed by different authority.

“[T]o collect appellate attorney fees, a party must demonstrate the right to do so under either a statute or a contract, independent of a costs statute.” (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 927 (*Butler-Rupp*).) Here, Protect sought attorney fees under section 1021.5. A plaintiff may be considered a successful party under this statute if it “““succeed[s] on *any* significant issue in litigation which achieves *some* of the benefit the parties sought in bringing suit.”””” (*Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 178.)

In contrast, the rules applicable to an award of costs on appeal are set forth in California Rules of Court, rule 8.278 (Rule 8.278). Rule 8.278 refers to a “prevailing party” being entitled to costs and specifies which party is so considered when the court of appeal affirms or reverses the judgment in its entirety, or dismisses the appeal. (Rule 8.278(a)(1), (2).) But it treats differently situations in which an appellate court reverses the judgment in part, as occurred in the first appeal in this case. In those situations, Rule 8.278 does not speak of entitlement, but rather states the court simply must “specify the award or denial of costs” in the opinion. (Rule 8.278(a)(3).) And elsewhere, the Rule

---

<sup>3</sup> At oral argument, Protect’s counsel appeared to concede Yorba Linda Estates raised the argument in the trial court. We have thoroughly reviewed the record and find no indication it did so. The only statement Yorba Linda Estates made about our determination regarding costs on appeal was in the context of attempting to convince the trial court Protect did not confer a significant benefit through the first appeal. That is a fundamentally different argument than the one it now asserts.

affirms an appellate court's authority to, "[i]n the interests of justice, . . . award or deny costs as it deems proper." (Rule 8.278(a)(5).)

Thus, the award of costs on appeal when an appellate court reverses part of a judgment is a discretionary matter. The same is true when a court awards or denies costs "in the interests of justice." (Rule 8.278(a)(5).) It follows that this court's exercise of discretion to have each party bear its own costs in the first appeal in this case does not bind the trial court in its determination of whether Protect is a successful party entitled to attorney fees under section 1021.5. (See *Butler-Rupp, supra*, 154 Cal.App.4th at p. 927 ["[A] decision about the entitlement to costs on appeal is entirely separate from a decision about the entitlement to attorney fees on appeal"].)

Yorba Linda Estates next attacks the scope of Protect's success on appeal, arguing Protect did not confer a significant public benefit by way of our partial reversal. It relies, in part, on the unpublished status of our first opinion. But a case need not result in binding precedent in order to provide a significant benefit to the general public. (See *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318 [significant benefit conferred even though court simply applied previously established legal principles]; *MBNA America Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 10 [order need not be binding precedent to confer significant benefit].)

While we agree with Yorba Linda Estates that not every CEQA case will necessarily result in a substantial benefit for purposes of section 1021.5, we find no abuse of discretion by the trial court's award of fees in this case. (*Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 737 [order granting attorney fees under section 1021.5 reviewed for abuse of discretion] (*Keep Our Mountains Quiet*).)

“[T]he “significant benefit” that will justify an attorney fee award [under section 1021.5] need not represent a “tangible” asset or a “concrete” gain[.]” (*Keep Our Mountains Quiet, supra*, 236 Cal.App.4th at p. 737.) It may be conceptual or doctrinal in nature (*RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175

Cal.App.4th 768, 781 (*RiverWatch*)), sometimes “recognized simply from the effectuation of a fundamental constitutional or statutory policy.” (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 939.)

In the first opinion in this case, we found three additional deficiencies in the EIR—concerning the Project’s description, fire hazards and water supply—which “were ‘neither insubstantial nor merely technical.’” (*Protect I, supra*, G054185.) Yorba Linda Estates understates the scope, significance and impact of these deficiencies. As we explained, County’s failures prevented an adequate investigation and discussion of the Project’s environmental impacts, deprived the public of a full understanding of the potential issues, and precluded full consideration and analysis of feasible mitigation measures to avoid or reduce the Project’s impacts to less than significant levels. (*Ibid.*) And, pursuant to our direction, the trial court ordered the County to revise the EIR to correct the deficiencies, providing the information and analysis which it should have provided in the first instance.

“Requiring a governmental agency to analyze or reassess environmental impacts associated with a proposed project confer[s] a significant benefit.” (*Keep Our Mountains Quiet, supra*, 236 Cal.App.4th at p. 737; see also *RiverWatch, supra*, 175 Cal.App.4th at p. 782.)

After all, as our Supreme Court has explained time and again, “[t]he EIR is the primary means of achieving the Legislature’s considered declaration that it is the policy of this state to ‘take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.’ [Citation.] [It] is therefore ‘the heart of CEQA.’ [Citations.]” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) It serves as both “an ‘environmental “alarm bell”” and “a document of accountability[,]” with “[t]he EIR process protect[ing] not only the environment but also informed self-government.” (*Ibid.*)

We also reject Yorba Linda Estates' contention Protect failed to show "litigation expenses would 'place a disproportionate burden' on [Protect]." "The financial burden criterion requires "the cost of the claimant's legal victory [to] transcend[] his personal interest." [Citation.] "[It] focuses on the financial burdens and incentives involved in bringing the lawsuit." (*Keep Our Mountains Quiet, supra*, 236 Cal.App.4th at p. 739.) To weigh these against one another, the trial court must: (1) "fix—or at least estimate—the monetary value of the benefits obtained by the successful litigants themselves"; (2) "discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome"; (3) calculate the actual total costs of litigation; and (4) award fees unless "the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs." (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215-1216.)

In its motion, Protect provided evidence of the actual costs of litigation and asserted it had no financial stake or economic interest in the outcome of the case. Yorba Linda Estates offered no rebuttal on the latter point. Instead, it simply pointed out, as it continues to do on appeal, that Protect "ha[s] raised, and continue[s] to raise, funds to pay a reduced hourly rate for legal services' under [its] hybrid contingency fee arrangement." That argument, at best, touches on the actual cost of the litigation. Without counterevidence concerning Protect's personal interest in the outcome of the case, it could have no impact on the award of attorney fees.

In sum, Yorba Linda Estates has not demonstrated the trial court abused its discretion in concluding Protect was entitled to attorney fees under section 1021.5.

Regarding the amount of attorney fees awarded, Yorba Linda Estates recognizes a trial court has discretion to reduce a party's attorney fees request under section 1021.5, based on the party's degree of success. (See *Save Our Uniquely Rural Community Environment v. County of San Bernardino* (2015) 235 Cal.App.4th 1179,

1185; *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (2010) 190 Cal.App.4th 217, 238; *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 612.) The trial court exercised its discretion and reduced the fee award to Protect by 20 percent due, in part, to its partial success on appeal. Yorba Linda Estates nevertheless urges us to depart from precedent by adopting a new rule restricting attorney fee awards under section 1021.5 “solely to the time spent on issues that [the] petitioners prevail on, rather than awarding fees for unsuccessful claims [as well].” But these policy-based arguments provide no basis for us to depart from well-established precedent noted above, and we decline to do so.

#### **DISPOSITION**

The order is affirmed. Respondents are entitled to their costs on appeal.

THOMPSON, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.